Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

DIANA HARVEY JOHNSON,
a.k.a. Diane Harvey Johnson,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 21, 2001

2 HPP

QUESTION PRESENTED

Whether application of the honest services mail fraud statute, 18 United States Code § 1346, and 2, to an elected state official violates principles of federalism and deprives the elected official of due process of law in violation of the Fifth Amendment where the elected official complied with her state's ethics in government law and the elected official actually performed services for compensation which she received.

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IN THE

Supreme Court of the United States

DIANA HARVEY JOHNSON,
a.k.a. Diane Harvey Johnson,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled criminal action on January 22, 2001.

OPINIONS BELOW

The unpublished decision of the Court of Appeals for the Eleventh Circuit, affirming Petitioner's conviction in the United States District Court for the Northern District of Georgia for violation of 18 United States Code §§1341, 1346, and 2, is set forth in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on January 22, 2001. Petitioner is currently at liberty on bail pending appeal. A date is yet to be set for her to voluntarily surrender to begin her sentence. This Court's jurisdiction is invoked under 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process of law clause of the Fifth Amendment and the free speech provisions of the First Amendment of the United States Constitution.

STATUTES INVOLVED

18 United States Code § 1341, Frauds and Swindles:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier, according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 United States Code § 1346, and 2, Definition of "scheme or artifice to defraud:"

> For the purposes of this chapter, the term "scheme to artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below

This case was brought by the United States of America against state legislator, Senator Diana Harvey Johnson, in the United States District Court for the Northern District of Georgia, Atlanta Division, on March 16, 1999. [Record Excerpts [RE] 1; R1-1].[1] The indictment alleged five counts relating to fraud and the scheme to defraud, and the theft of honest services, under Title 18 United States Code §§1341, 1346, and 2. [RE 1, at 20].

On June 14, 1999, the Report and Recommendation of United States Magistrate Judge John E. Dougherty concerning Petitioner's pretrial motions was filed. [RE - 37;R1-37]. Further, pretrial proceedings were concluded before the trial judge, the Honorable G. Ernest Tidwell, on July 6, 1999. [R1 - 38 thru 70].

On July 7, 1999, the action proceeded to trial before a jury, and concluded on July 21, 1999, when the jury returned its verdicts of guilty on all counts against Petitioner. [R1 - 71; R2-106]. On July 7, 1999, sentencing was set for November 5, 1999. [R2 - 107]. Thereafter, on July 30, 1999, defendant filed her motion for new trial on the grounds of instructional errors. [R2-108].

On November 5, 1999, the district court denied the motion for new trial from the bench without comment. [R16-134, Tr. 2:18-19]. The district court then heard from counsel for the parties, reviewed their sentencing memoranda, heard from witnesses for Petitioner, and heard from the Petitioner before

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[1] All citations to evidentiary matters are to either the Record Excerpts (RE) or to the Clerk's Record (R) in the Eleventh Circuit.

pronouncing sentence. [R16-134]. The district court sentenced Petitioner to 41 months as to each count to run concurrently, one with the other, three years supervised release, special assessment of $500.00, fined Petitioner $7,500, and permitted voluntary surrender. [RE 114; R2 113, and 114].

On November 8, 1999, Petitioner filed a timely motion for bond pending appeal. [R2-115]. On December 1, 1999, after Petitioner resigned her position as a Georgia State Senator, representing the Second Senatorial District in Chatham County, Georgia, the district court granted her motion for bail pending appeal. [R2- 119].

On November 15, 1999, Petitioner timely filed notice of appeal. [R2-117].

B. Statement of the Facts

In the Fall of 1994, Petitioner Diana Harvey Johnson was a state Senator and a member of the Legislative Black Caucus. She was Chair of the Economic Development subcommittee. [R4-122, Transcript of Pretrial Proceedings (Tr.) 7].

In her official duties, she lobbied for $5000 to be put into the state's supplemental budget in Fiscal Year 1994. Those funds were earmarked to be used to aid in the development of the Greater Savannah Black Tourism Network, through the Georgia Department of Industry, Trade, and Tourism (GDITT)]. [*Ibid*]. Of that $5,000, $4000 was contracted for and paid to CAA Consulting Corporation, Petitioner's sole proprietorship, as a fee for services rendered to the Greater Savannah Black Tourism Network. [*Ibid*, at 8]. At no time was it said that such actions would constitute a conflict of interests, nor was Petitioner ever aware that such alleged conflict may have existed.

Shortly thereafter, Petitioner arranged for GDITT to enter into a $4200 contract with Greater Savannah, a nonprofit

corporation, to produce six (6) African American heritage brochures. [*Ibid*]. Petitioner and Linda Patrick who was employed by GDITT as its Art Director produced the brochures. [R11, 129, Tr. 1028, Gov. Exh. 42]. Greater Savannah paid Petitioner $4200 for her work to produce the brochures. [R4-124, Tr. 8]. However, Betty Simmons, the President of Greater Savannah, was not aware of the payment. [*Ibid*].

Petitioner voted for a state budget which included a $300,000 grant to be earmarked for the Greater Savannah Tourism Network to promote African American tourism. [R4-122, Tr. 10]. GDITT administered the funds and made a $300,000 grant to the Peach State Black Tourism Association (PSBTA), a nonprofit corporation. [*Ibid*].

From the $300,000 grant to PSBTA, Petitioner was paid a total of $75,439.50. [Government's Sentencing Memorandum, at 1]. The Government contended that Petitioner only earned $53,833 for her services. [*Ibid*]. The Government's estimate of reasonable compensation for Petitioner's services was based upon its assumption that her compensation should have approximated what PSBTA paid its Executive Director. [*Ibid*]. The Government's assumption ignored the fact that Petitioner was an independent contractor with actual out-of-pocket expenses and lost business opportunities. She suffered a $45,749.86 loss in her earnings from her consulting firm during the 17 months she acted as de facto Executive Director of PSBTA. [See and compare, Gov. Exh. 229A, at 29, 37, 45, and 48]

State officials, including the Governor, were aware of Petitioner's interest in tourism and work for the Black tourism network. They never suggested to her that she might have a conflict of interest. At trial, they testified that they were not aware that Petitioner was paid for her services or that she expected to be paid for her services. [R4-122, Tr. 12]. They

learned that Petitioner had been paid when they received their auditor's report. [R12-130, Tr. 1253:9].

In connection with the auditor's report, when PSBTA first responded and provided documentation, GDITT rejected it because it was too detailed. [R12, 130, Tr.1260:15]. GDITT requested PSBTA to provide information created in a financial format rather than a transactional format, which PSBTA made and kept in the regular course of business. As a result, PSBTA was directed to create a financial report which resulted in numerous errors.

Following the auditor's report the matter was referred to the United States Attorney for Northern Georgia. He presented it to the Grand Jury which on March 16, 1999 returned a five-count indictment against Petitioner for mail fraud. The indictment was based upon five mailings which occurred between October 26, 1995 and December 11, 1996. [RE 1, at 20]. Petitioner's trial in the district court before a judge and jury and her unsuccessful appeal to the Eleventh Circuit appeal followed.

In this case, Petitioner did not use her public position to pursue dishonest ends. She did not vote to appropriate $300,00 to the GDITT in exchange for a *quid pro quo*. She did not ask for and did not receive kickbacks for her efforts to promote tourism in Georgia. She did not bribe anyone. Petitioner worked for the money she received. As one witness, Geraldine Price, testified:

> "Well. We first started out everybody was assigned to different committees, but in the end, it wound up only Ms. Johnson and a few others was doing all the work. But the night of any event or the day of any event everybody received a lot of recognition, you did a good job, and really they didn't do anything. Ms. Johnson was doing all the work. I felt sorry for her

because she was up sometimes late at night. .... Any I really felt sorry for her because she was doing all the work."

[R13, 131, Tr. 1434:24-1435:9]

The Government's case rests upon evidence that Petitioner paid herself for work she actually performed without first disclosing the payments.

REASONS FOR GRANTING THE WRIT

A. The Public and National Importance of the Case.

The writ should be granted because of the public importance of this case. Applied to a state legislator, honest services fraud stands federalism on its head. The statute, §1346, transfers the power to set standards of disclosure and good government from state legislatures to local federal prosecutors in the first instance and to the federal courts without a clear and unequivocal grant of such power by either the Congress or the states. It impermissibily sanctions use of the awesome power of the federal government to settle scores between local political opponents upon the slightest hint of a conflict of interest between a local public official's duty to his or her constituents and his or her own personal interest. The prosecution for honest services fraud imperils every elected official in the nation who may for the most laudable motives and plausible reasons, as Petitioner had, fails to disclose an actual or apparent conflict of interest.

B. The Decision Below Conflicts with a Recent Decision of this Court.

The writ should be granted because the decision below conflicts with this Court's recent decision in *Cleveland v. United States*, ___ U.S. ___ (No. 99 804,11/800)[http://caselaw.lp.findlaw.com/cgi 11/8/00]. In *Cleveland v. United States, supra*, this Court held that a video

poker license is not property which supports a prosecution for mail fraud under §1341. There, the defendants had concealed their ownership interest because they had disqualifying tax and financial problems and had participated in a scheme to bribe state legislators to vote for legislation which favored the video poker industry. In reaching its decision, this Court explained that the Government's reading of §1341 invited the Court "to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal prosecution a wide range of conduct traditionally regulated by state and local authorities." [*Cleveland v. United States, supra* http://caselaw.lp.findlaw.com, at 8].

In this case, use of §1346 to prosecute Petitioner represents a sweeping application of the criminal law in an area which has not been defined by Congress. Such a sweeping application of federal law is inappropriate, "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance' in the prosecution of crime." *Cleveland v. United States, supra,* quoting *Jones v. United States,* 529 U.S. 848, 858 (2000)(quoting *United States v. Bass,* 404 U.S. 336, 349 (1971).

There is no legislative history to support the application of § 1346 to Petitioner's conduct, and the statute on its face provides no guidance as to its sweep. §1346 should no more be allowed to "arm federal prosecutors with power to police" the ethics of state legislators than §1341 allows them to police false statements submitted to state and local authorities, which this Court condemned in *Cleveland v. United States, supra,* [findlaw, at 9]. Moreover, §1346 impermissibly overrides the state's own carefully drawn and well-established ethic's in

government laws. See, Georgia's Ethics in Government Act (§45-10- et seq., the Official Code of Georgia Annotated (O.C.G.A.)

C. Application of §1346 in this Case Impermissibily Inverts Federal State Relations.

In 1988, §1346 was enacted as an amendment to the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508. It provides that the mail, wire and bank fraud statutes prohibit schemes to defraud another of "the intangible right of honest services." The legislative history of §1346 is meager. See, *United States v. Brumley*, 79 F.3d 1430, 1436 (5th Cir.1996); and *United States v. Brumley*, 116 F.3d 735 (5th Cir.1997)(*en banc*), *cert. denied*, ____U.S. ___, 118 S.Ct. 625 (1997).

§1346 was enacted to overturn *McNally v. United States*, 483 U.S. 350 (1987), which held that the mail fraud statute (18 United States Code §1341) applied only to money or property fraud. Lower federal courts have generally held that §1346 reinstated the pre*McNally* doctrine of the intangible right to honest services. See, for examples, *United States v. Frost*, 125 F.3d 346, 364 (6th Cir.1997), *cert. denied*, U.S. ; *United States v. Blumeyer*, 114 F.3d 758, 765 (8th Cir.1997), *cert. denied*, ___U.S. ___, 118 S.Ct. 350 (199); and *United States v. Bissell*, 954 F.Supp. 841, 846 (D.N.J.1996).

The Fifth Circuit is the only Circuit which recognizes the inversion of federalism which §1346 brings about, when it is applied to a public official. See, *United States v. Brumley*, 116 F.3d at 733-35. In *Brumley II*, the Fifth Circuit relied on the plain language of the statute, legislative history, and principles of federalism to hold that a federal prosecutor must prove that the conduct of a state official breached a duty owed the state under state law. In doing so, the Fifth Circuit recognized that in mail fraud prosecutions federal law defines the scheme or

artifice to defraud elements. The Fifth Circuit held that §1346 defines honest services by reference to duties found in state law.

> "We begin with the plain language of the statute. The are two words -- "honest" and "services." We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees. We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services--to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure. Under the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law. This means that of the official does all that is required under state law, alleging that the services were not otherwise done "honestly" does not charge a violation of the mail fraud statute. The statue contemplates that there must first be a breach of a state-owed duty ...
>
> ...
>
> ... Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of 'good government' with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness.

The Fifth Circuit's concern that the honest services fraud, applied to a public official, is at odd with traditional notions of federalism is one shared by this Court. "Under our federal system, the 'states possess primary authority for defining and enforcing criminal law.'" *United States v. Lopez*, 514 U.S. 549, 561, n.3 (1995). In *Lopez*, this Court held that Congress exceeded its power under the commerce clause to criminalize possession of firearms in Gun Free School Zones. But for the inversion of federalism, the need to provide Gun Free School Zones for the nation's school children is hardly less deserving of federal protection than the abuse of trust occasioned by the a local legislator's failure to disclose a real or apparent conflict of interest. [2]

D. Imposition of a Duty to Disclose a Conflict of Interest Based Only on §1346 Contravenes Principles of Federalism and Results in Its Unconstitutional Application.

Application of §1346 to impose a duty to disclose on an elected public official, *without an administrative regime to provide for giving notice*, contravenes longstanding principles of federalism and justifies review of Petitioner's conviction in this Court. Imposing a duty to disclose beyond a state's orderly disclosure process based only upon judicially created notions of what's right or fair on a case-by-case basis without prior notice to affected public officials is at odds with longstanding principles of federalism and comity between sovereigns as well.

In *United States v. Sun-Diamond Growers*, 526 U.S. 398, 411 (1999), this Court condemned the use of federal criminal

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[2] As the Fifth Circuit observed, it is not for federal prosecutors in the first instance to "impose upon states a federal vision of appropriate services - to establish, in other words, an ethical regime for state employees." *United States v. Brumley*, 116 F.3d, at 734.

law to ensnare "unwary" officials who complied with existing ethics regulations. Georgia's Ethics in Government Act (§ 45-10-20 et seq., the Official Code of Georgia Annotated (O.C.G.A.) imposes upon elected public officials such as Petitioner a duty to make annual disclosure of outside interests which meet certain criteria. Petitioner fully and timely complied with Georgia's Ethics in Government Act.

At trial, the Government offered Petitioner's Financial Disclosure Statements for three years, 1993, 1995, and 1996. [R. Gov. Exh. 233, at 4; Exh. 234, at 4; Exh. 235, at 4]. In each statement, she disclosed her ownership interest in CAA Consulting Corporation, a marketing and public relations consulting firm, located in Savannah. She disclosed that her ownership interest was more than 10% and the fair market value of her ownership interest exceeded $20,000. Petitioner did not have a disclosable interest in either PSBA or Greater Savannah, the nonprofit entities through which she received payment for services rendered. [[Gov. Exh. 51 and 69, at 2, ¶4].

§1346's failure to provide notice that Petitioner was required to make disclosures beyond those required by state law and its failure to provide any defined process by which she could do so render it unconstitutional as applied. The due process clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994), quoting *Kolender v. Lawson*, 461 U.S. 352 (1983).

§1346 fails to give fair, prior notice that disclosures beyond ones required by state law are required of an elected state official to avoid a conviction for mail fraud. The imposition of an additional disclosure duty deprived Petitioner of due process of law in violation of the Fifth Amendment. The statute did not

give her prior notice that in addition to filing her annual financial disclosure with the State she was also required to make *ad hoc* disclosures to any interested or casual party with whom she discussed tourism.§1346 was unconstitutionally applied in this case.

The vagueness and overbreadth of the statute trenches on First Amendments interests as well. The indictment itself shows that the prosecution was brought to punish Petitioner for her advocacy and votes on legislation, prototypical First Amendment activity. [R Vol. 1, Indictment, at 3, ¶3(a). Petitioner's failure to make *ad hoc* disclosures supported prosecuting her under §1346 for the March 29, 1996 letter to the Governor attributed to her. The letter to the Governor clearly constituted exercise of First Amendment rights. It was written to a Governmental official in response to matters which appeared in the local news media. An elected public official has no lesser First Amendment rights than an ordinary citizen. See, *Bond v. Floyd*, 385 U.S. 116, 133 (1966).

E. The Fact that §1346 May Be Construed, as the Eleventh Circuit Construes It, Does Not Cure Constitutional Defects in Its Application to Public Officials.

Since the mail fraud statute was amended to add §1346, the Eleventh Circuit has decided three (3) cases involving elected public officials who were charged with using the mails to perpetuate a scheme to deprive their constituents of the intangible right to their honest services. *United States v. Lopez-Lukis*, 102 F.3d 1164 (11th Cir.1997); member of the elected Board of County Commissioners of Lee County Florida; *United States v. Paradies*, 98 F.3d 1266 (11th Cir.1996), an elected member of the Atlanta City Council; and *United States v. Waymer*, 55 F.3d 564 (11th Cir.1995) an elected member of the Atlanta School Board. This case differs in a very

fundamental way from these cases. The Government did not claim that Petitioner engaged in bribery or took kick backs.

The Eleventh Circuit has sustained convictions of public officials under §1346 by finding that the statute itself imposes the duty to disclose independent of state law. In this case, summarily rejecting Petitioner's claim that §1346 was unconstitutionally applied to her, the Eleventh Circuit merely stated that "the duty owed under the honest services provision is a question of federal, not state law," citing *United States v. DeVegter*, 198 F.3d 1324, 1328-29 and n.5 (11th Cir.1999). [App. A, *infra*, at 3].

The fact that §1346 may be read to imposes a duty to disclose independent of state law does not cure its needless inversion of federal-state relations. Nor does that construction make it less a battering ram for federal prosecutors to use against elected state officials. The Eleventh Circuit's approach allows elected state officials to be prosecuted federally for even an appearance of a conflict of interest without regard to the injury to federal state relations. Every act of an elected state official becomes subject to prosecution under §1346 under the Eleventh's Circuit approach, since a state official has a heightened fiduciary duty to his or her constituents. See, *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.1941). Neither the meager legislative history of §1346 nor principles of federalism countenance such a wide open application of the statute to criminalize the conduct of elected state officials.

CONCLUSION

For the reasons stated, Petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

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February 21, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14779

D.C. Docket No. 99-00136-CR-1-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DIANA HARVEY JOHNSON,
a.k.a., Diane Harvey Johnson,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

FILED
January 22, 2001

Before TJOFLAT, BARKETT and POLITZ*, Circuit Judges.

PER CURIAM:

Appellant Diana Harvey Johnson was indicted by a federal grand jury in the Northern District of Georgia on March 16, 1999. The indictment charged Johnson with five counts relating to fraud and the scheme to defraud, and the theft of honest services, in violation of 18 U.S.C. §§ 1341, 1346, and 2. The indictment charged Johnson with defrauding the State

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* Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

of Georgia and its citizens of their right to honest services as an elected state senator and defrauding them of their money and property through use of the United States mails.

A jury convicted Johnson on all five counts on July 21, 1999, specifically finding Johnson guilty under both the honest-services provision and the money-and-property provisions of the mail fraud statute. The district court held a sentencing hearing on November 5, 1999, and sentenced Johnson to 41 months' imprisonment on each count, to run concurrently.[1] On November 15, 1999, Johnson filed a timely notice of appeal.

Johnson raises five issues on appeal:

1) That the district court erred in failing to give the defendant's proffered special jury instructions on the honest-services provision of the mail fraud statute.

2) That the evidence was insufficient to support guilty verdicts on the various counts of the indictment.

3) That the mail fraud statute was unconstitutionally applied to impose a duty to disclose beyond that duty prescribed by state law.

4) That the indictment was multiplicitous in charging five counts of mail fraud.

5) That the district court erred in sentencing Johnson to 41 months' imprisonment, which is the high end of the Guideline range.

Johnson's assignments of error are without merit. The district court did not abuse its discretion in refusing to give two

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[1] Johnson was also sentenced to three years' supervised release, ordered to pay a special assessment of $500.00, fined $7,500.00, and ordered to pay restitution in the amount of $21,606.00 to the State of Georgia's Office of Treasury and Fiscal Services.

requested jury instructions on the honest-services provision of the mail fraud statute. *See United States v. Paradies*, 98 F.3d 1266, 1284-87 (11th Cir. 1996). The evidence in this case was sufficient to support a guilty verdict, viewed in the light most favorable to the Government and resolving all reasonable inferences and credibility determinations in favor of the jury's verdict. *See United States v. Bailey*, 123 F.3d 1381, 1390 (11th Cir. 1997). The mail fraud statute was not unconstitutionally applied, as the duty owed under the honest services provision is a question of federal, not state, law. *See United States v. DeVegie*, 198 F.3d 1324, 1328-29 and n.5 (11th Cir. 1999). The indictment was not multiplicitous in charging five counts of mail fraud based on five separate mailings. *See United States v. Edmondson*, 818 F.2d 768, 769 (11th Cir. 1987).

Finally, the district court did not abuse its discretion in sentencing the defendant at the high end of the sentencing range; we generally do not review sentences within the guideline range, and we do not see a need to do so in this instance. *See United States v. Alamin*, 895 F.2d 13351,1337 (11th Cir. 1990).

AFFIRMED.

Supreme Court, U.S.
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MAY 15 2001
OFFICE OF THE CLERK

No. 00-1338

In the Supreme Court of the United States

DIANA HARVEY JOHNSON, AKA
DIANE HARVEY JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has established plain error in her mail fraud convictions for depriving the State of Georgia and its citizens of their intangible right to her honest services as a state legislator, in violation of 18 U.S.C. 1341 and 1346, because her conduct allegedly did not violate state disclosure law and because she allegedly lacked notice that her fraudulent scheme, which involved the receipt of payments from the State without disclosure of her conflict of interest, constituted a deprivation of honest services.

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In the Supreme Court of the United States

No. 00-1338

DIANA HARVEY JOHNSON, AKA
DIANE HARVEY JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2001. The petition for a writ of certiorari was filed on February 21, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on five counts of defrauding the State of Georgia and its citizens of their right to her honest services and of their money and property through the use of the United States mails, in violation of 18 U.S.C. 1341, 1346, and 2. Petitioner was sentenced to 41 months' imprisonment, to be followed by three years' supervised release, fined $7500, and ordered to pay restitution to the State of Georgia in the amount of $21,606. The court of appeals affirmed. Pet. App. 1a-3a.

1. a. In 1994, petitioner, a Georgia State Representative, was the sole proprietor of a business located in Savannah, Georgia, named CAA Consulting Corporation (CAA). In early 1994, petitioner founded the Greater Savannah Black Tourism Network (Greater Savannah), a non-profit organization to promote black tourism in the Savannah area. Although petitioner controlled Greater Savannah from the outset and operated it from her company's offices, she represented herself to be a mere "Advisor" to this entity. Petitioner recruited most of Greater Savannah's Board members and selected its officers, including Betty Simmons, a state employee, as President and Chairman, and Julia Wright, a schoolteacher, as Treasurer. Gov't C.A. Br. 4-6.

In January 1994, petitioner met with Hanna Ledford, an official with the Georgia Department of Industry, Trade and Tourism (Department). Petitioner told Ledford about the black tourism network idea and said that she would get funding added to the Department's budget to pay for it. Within a few weeks, $5000 was added to the State's Supplemental Fiscal Year 1994

budget as a line item requiring the Department to contract with the "Georgia Black Tourism Network." On February 4, 1994, petitioner voted in favor of that budget. Gov't C.A. Br. 6-7. Greater Savannah promptly sent a letter to the Department proposing a $5000 contract with the State. The letter was sent in the name of Wright, Greater Savannah's Treasurer, even though Wright knew nothing about the proposal, and merely signed it at petitioner's request. On May 15, 1994, the Department entered into a contract with Greater Savannah for the $5000, money intended to pay for expenses related to the development of black tourism organizations in six cities in Georgia. Petitioner had Wright sign the contract. None of the Greater Savannah Board members knew anything about the state funding or the contract. Gov't C.A. Br. 7-8.

Shortly after Greater Savannah received the $5000 from the Department, petitioner wrote a Greater Savannah check in the amount of $2500 to her company, labeling the check as an "installment on loan."[1] The same day, petitioner wrote a CAA check to the Internal Revenue Service for a similar amount to pay her personal taxes. A few weeks later, petitioner caused another Greater Savannah check, for $1500, to be paid to her company for unspecified "services." During that period, petitioner had no contract with Greater Savannah and submitted no invoices. Gov't C.A. Br. 8-9.

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[1] Although Wright supposedly had sole authority over Greater Savannah's bank account, Wright wrote checks at petitioner's direction, gave petitioner pre-signed blank checks to use, and allowed petitioner to write and sign checks using Wright's name. Gov't C.A. Br. 8.

In May 1994, petitioner wrote a letter, again over Wright's signature, proposing that the Department pay Greater Savannah to prepare six African-American heritage brochures. Petitioner falsely told Ledford that Wright would do the work. On September 12, 1994, the Department entered into a $4200 brochure contract, which petitioner signed for Greater Savannah in the forged name of Wright. Over the next year, petitioner worked intermittently on the brochures. Although Department officials eventually recognized that petitioner was involved in work on the brochure contract, they never believed that she would be paid on that contract. Gov't C.A. Br. 9-10.

On November 30, 1995, Greater Savannah submitted to the Department a $4200 invoice, bearing the forged signature of Aileura Crawford, a CAA employee. On December 15, 1995, the State paid the $4200 to Greater Savannah. A week later, petitioner forged Wright's endorsement and deposited the check into the Greater Savannah bank account; she then forged Wright's signature to a Greater Savannah check paying the entire $4200 to CAA. Gov't C.A. Br. 10.

In September 1994, Greater Savannah proposed that the Department pay it $1800 to organize a workshop on multicultural tourism on December 6, 1994—another proposal letter submitted over the forged signature of Wright, who knew nothing about it. Petitioner actually arranged the workshop, and she spoke at it as a state legislator with no disclosure that she was being paid. Petitioner then directed Wright to sign a Greater Savannah invoice to the Department for $1700. The Department paid the invoice, and a few weeks later petitioner wrote and signed (using Wright's name) a Greater Savannah check funneling $1000 of this money to her company. Gov't C.A. Br. 10-11.

b. In early 1994, petitioner began organizing the Peach State Black Tourism Association (Peach State) as a nonprofit group that would promote black tourism throughout Georgia. Once again, petitioner controlled Peach State from the outset, while portraying herself as a mere "Advisor" and installing Simmons as Chairman and Wright as Treasurer. Gov't C.A. Br. 11-12.

During the summer of 1994, petitioner proposed that more than $300,000 be included in the Department's budget for Fiscal Year 1996 as a line item earmarked to Peach State. In the fall of 1994, petitioner was elected to the State Senate and also became Chairman of the Legislative Black Caucus (Caucus). She promoted the Peach State concept in the Caucus, and included it as the first item on the Caucus's economic development agenda that she sent to Governor Zell Miller in September 1994. Gov't C.A. Br. 10, 12.

In the fall of 1994, petitioner promoted the Peach State proposal in various forums and ultimately with Governor Miller himself. Governor Miller included $300,000 for Peach State in his Fiscal Year 1996 budget bill. On March 17, 1995, petitioner voted in favor of that legislation without disclosing either her control of or financial interest in Peach State. Gov't C.A. Br. 12-13.

In July and August 1995, petitioner arranged for Peach State to hire three full-time paid staff whose salaries she set. The staff worked in extra space in the Department's Atlanta offices, but Peach State's finances were handled from Savannah. As with Greater Savannah, Peach State's bank account, although nominally under the control of Wright, was actually controlled by petitioner. Gov't C.A. Br. 13.

On September 1, 1995, the Department entered into a $300,000 contract with Peach State. Pending receipt of the funds, petitioner used Peach State, Greater Savan-

nah, CAA, and even Caucus money interchangeably. On September 7, 1995, in her capacity as Caucus Chairman, petitioner wrote a Caucus check for $10,000 to Peach State, without notifying any other Caucus officers. Petitioner then had Peach State pay half of the Caucus money to Greater Savannah, which funneled that $5000 to petitioner's company, where she used it to pay her own taxes. Gov't C.A. Br. 14-15.

On October 23, 1995, the Department contract was amended so that Peach State could obtain the entire $300,000 up front.[2] On November 3, 1995, the Department paid the $300,000 to Peach State. On November 8, 1995, petitioner had Peach State use $10,000 to repay the loan from the Caucus ($5000 of which had gone to her). Starting on that date and continuing periodically for more than a year, petitioner caused another $67,832 to be paid from Peach State through Greater Savannah to CAA, and $2600 to be paid from Peach State to Rainbow School and Office Supplies (Rainbow), another business name that petitioner used. Gov't C.A. Br. 15-16.

Although petitioner performed some services for Peach State, the value of those services was less than the money she paid herself. There were no contracts between Peach State and Greater Savannah, Rainbow, or CAA, and no invoices were submitted before the checks were written. Instead, petitioner decided when and how much she would be paid, and then caused the

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[2] As a condition of that amendment, the organization was required to provide a budget showing how the money would be spent and submit periodic activity and financial reports to the Department. The budget mailed on October 26, 1995, did not mention any payments to or services to be provided by Greater Savannah, CAA, Rainbow School and Office Supplies (another entity controlled by petitioner), or petitioner. Gov't C.A. Br. 5, 15.

payments either by directing Julia Wright to write the necessary checks or writing them herself, faking Wright's signature. Gov't C.A. Br. 16.

In March 1996 and in March 1997, petitioner voted in favor of state budgets for Fiscal Years 1997 and 1998 that included additional funding for Peach State, without revealing her financial interest in that entity. Documents prepared by Peach State to justify continued funding made no mention of Greater Savannah, Rainbow, CAA, or petitioner. Gov't C.A. Br. 18-20.

c. When faced with questions about her scheme, petitioner falsified numerous documents in an effort to conceal her wrongdoing. In March 1996, after news reports questioned her relationship with Greater Savannah, petitioner wrote a letter to Governor Miller and other top state officials criticizing those reports. That letter was sent in the name of Betty Simmons (who knew nothing of it), and petitioner had her assistant forge Simmons' signature. Likewise, in response to questions about the original $5000 contract with the State, Greater Savannah faxed the Department a backdated letter, dated July 29, 1994, that described what Greater Savannah had supposedly done to earn the $5000. That letter, which did not mention petitioner, was sent over the forged signature of Betty Simmons. Gov't C.A. Br. 21.

In early 1997, the State requested an independent audit of Peach State. In response to an auditor's inquiry asking for documentation of payments to Greater Savannah, petitioner created a variety of phony, backdated documents that others signed at her direction. The fake documents included a backdated promissory note for the $10,000 Caucus loan; a backdated letter from Simmons purporting to establish that Peach State's original Executive Director (who was

then deceased) had suggested hiring CAA as a consultant through Greater Savannah; and a backdated set of invoices from Greater Savannah to Peach State. After the auditor traced the state money from Peach State through to petitioner's company, petitioner created a phony, backdated retainer letter from Greater Savannah to CAA. Petitioner also created forged, backdated, inaccurate invoices from CAA to Greater Savannah. Gov't C.A. Br. 23-25.

2. A federal grand jury in the Northern District of Georgia returned an indictment charging petitioner with five counts of defrauding the State of Georgia and its citizens of their right to her honest services and of their money and property through use of the United States mails, in violation of 18 U.S.C. 1341, 1346, and 2. Section 1341, the federal mail fraud statute, prohibits the use of the mails for "any scheme or artifice to defraud"; Section 1346 provides that a "scheme or artifice to defraud" prohibited by Section 1341 includes "a scheme or artifice to deprive another of the intangible right of honest services." During pretrial proceedings, petitioner did not contend that the honest-services theory of mail fraud could not apply to this case because her conduct was lawful under Georgia law. Nor did petitioner seek a judgment of acquittal on the ground that the government's proof at trial failed to establish a violation of Georgia law. In a special verdict form, the jury found petitioner guilty on all five counts, and further found that she intended to defraud the State of Georgia and its citizens of both their intangible right to honest services and their money or property. See Gov't C.A. Br. 3.

3. Petitioner appealed. While acknowledging that she had failed to raise the claim below, see Pet. C.A. Br. 35, petitioner argued that "longstanding principles of

federalism" (*id.* at 40) precluded her conviction for a scheme to defraud the State of Georgia of her honest services because she "fully and timely complied with Georgia's Ethics in Government Act" (*id.* at 37). Citing *United States* v. *Brumley*, 116 F.3d 728, 733-735 (5th Cir.) (en banc), cert. denied, 522 U.S. 1028 (1997), petitioner argued that the mail fraud statute "defines honest services by reference to duties found in state law," and so, absent a violation of state law, she could not be convicted of that crime under the honest-services theory of mail fraud. Pet. C.A. Br. 39. Petitioner also argued that the mail fraud statute was "unconstitutionally applied in this case" because it failed to give her notice that she was required to make any disclosures beyond those required by state law. *Id.* at 41-42.

The court of appeals affirmed in an unreported per curiam opinion. Pet. App. 1a-3a. The court stated that "[t]he mail fraud statute was not unconstitutionally applied, as the duty owed under the honest services provision is a question of federal, not state, law." *Id.* at 3a (citing *United States* v. *deVegter*, 198 F.3d 1324, 1328-1329 & n.5 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000)).

ARGUMENT

Petitioner contends that constitutional principles of federalism and due process preclude her conviction under the honest-services theory of mail fraud. Pet. 7-14. Neither contention warrants this Court's review.[3]

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[3] Because the jury convicted petitioner on each count under both an "honest services" and a "money or property" theory of mail fraud, see p. 8, *supra*, petitioner's contention, even if correct, would not affect her convictions. It could, however, affect petitioner's sentence because mail fraud offenses involving a depriva-

1. The federal mail fraud statute, 18 U.S.C. 1341, proscribes the use of the mails in furtherance of "any scheme or artifice to defraud." Before 1987, every court of appeals that had addressed the issue had held that the mail fraud statute reached public corruption schemes intended to deprive citizens of their intangible right to honest services by public officials. See *United States* v. *Paradies*, 98 F.3d 1266, 1283 n.30 (11th Cir. 1996) (collecting cases), cert. denied, 522 U.S. 1014 (1997). In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that the mail fraud statute was "limited in scope to the protection of property rights," and it reversed the mail fraud convictions in that case, which had been premised on the theory that the defendants, as public officials, had engaged in a scheme to deprive the citizens of Kentucky of their intangible right to honest government. See *id.* at 360; see also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987).

In 1988, Congress responded to the decision in *McNally* by enacting 18 U.S.C. 1346, which specifically provides that a "scheme or artifice to defraud" prohibited by Section 1341 includes "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7603, 102 Stat. 4508. The legislative history of Section 1346 makes clear that Congress intended to overturn the result in *McNally* and to bring within the coverage of the mail and wire fraud statutes schemes to deprive citizens of their intangible right to honest services by public officials. See 134 Cong. Rec.

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tion of the intangible right to honest services of a public official are sentenced under a different Sentencing Guideline (Guidelines § 2C1.1) than offenses involving a deprivation of money or property alone (see Guidelines § 2F1.1).

32,708 (1988) (Sen. Biden); *id.* at 33,296-33,297 (Rep. Conyers).

2. Petitioner contends that her mail fraud convictions cannot rest upon the honest-services theory of Section 1346 because constitutional principles of federalism preclude the application of Section 1341 to state political officials who are acting in compliance with state law. See Pet. 7-14. Petitioner failed, however, to raise that contention in the district court. See pp. 8-9, *supra*. Accordingly, her claim may be reviewed at this time only for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993). To satisfy the plain-error standard, an error must at a minimum be "clear" or "obvious." *Id.* at 734 ("At a minimum, court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law."). Petitioner cannot show any error here, much less any clear or obvious error.

First, neither this Court nor any court of appeals has held Sections 1341 and 1346 to be unconstitutional as applied to a state legislator whose actions did not violate state law. In addition, the Eleventh Circuit, in which this case arose, has ruled that the existence of any duty owed under the honest-services theory of mail fraud is a question of federal, not state, law, so that no showing of a violation of state law is necessary for a conviction under Section 1346. See *United States* v. *deVegter*, 198 F.3d 1324, 1328-1329 & n.5 (1999), cert. denied, 530 U.S. 1264 (2000). Accordingly, the district court's failure to dismiss *sua sponte* the honest-services allegations in the indictment on federalism grounds was not plain error, for such a dismissal was not required by any controlling legal authority in the Eleventh Circuit.

Petitioner's reliance (Pet. 9-11) on the Fifth Circuit's decision in *Brumley*, *supra*, is misplaced. In *Brumley*, the court of appeals concluded that, "[u]nder the most natural reading of [Section 1346], a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law," *i.e.*, "the official must act or fail to act contrary to the requirements of his job under state law." 116 F.3d at 734. *Brumley*, however, was a holding of statutory construction, and although the court did acknowledge "federalism arguments" in reaching its decision that the honest-services theory of mail fraud reaches only state officials who had acted contrary to state law, see *id.* at 735, it did not hold that Section 1346 would be unconstitutional unless it were so limited. See also *id.* at 736 (Jolly, J., dissenting) (arguing that Section 1346 did not reach deprivation of honest services by state officers acting in their official capacities, but also making clear that "we do not at all suggest that the criminal statute at issue is unconstitutional or must otherwise be stricken"). *Brumley* therefore does not support the constitutional claim advanced here by petitioner. Moreover, the Fifth Circuit's limitation of Section 1346 in *Brumley* has not been adopted by any other circuit; all other courts of appeals that have addressed the issue have ruled that proof of a violation of state law is not necessary to a conviction under the honest-services theory of mail fraud.[4]

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[4] See *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001); *United States* v. *Martin*, 195 F.3d 961, 966 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000); *United States* v. *Bryan*, 58 F.3d 933, 940 (4th Cir. 1995); see also *United States* v. *Margiotta*, 688 F.2d 108, 123-124 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983);

Petitioner's contention (Pet. 7-9) that the decision below conflicts with *Cleveland* v. *United States*, 121 S. Ct. 365 (2000), is also wide of the mark. In *Cleveland*, the Court concluded that unissued state permits or licenses do not qualify as "property" under Section 1341 even though they may become property in the recipients' hands. *Id.* at 368. In so holding, the Court noted that a contrary ruling "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities" and declined to adopt such an interpretation "in the absence of a clear statement by Congress." *Id.* at 373. Nothing in *Cleveland* casts doubt on the federal government's constitutional authority to prosecute state and local corruption by using the honest-services provision of Section 1346. Indeed, the Court specifically noted that "[i]n this case, there is no assertion that Louisiana's video poker licensing scheme implicates the intangible right of honest services." *Id.* at 371. Moreover, because the honest-services provision in Section 1346 was, as noted above, specifically intended by Congress to overturn *McNally* and to restore the federal government's ability to combat public corruption through the mail fraud statute, this Court's refusal to read the term "property" broadly in *Cleveland* has little relevance here.

Second, petitioner cannot show plain error because she has failed to demonstrate that her conduct was consistent with state law. Although petitioner now contends (Pet. 12) that she "fully and timely complied with Georgia's Ethics in Government Act," that assertion was not proven below, and, had it been relevant, would have been disputed by the government. More-

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United States v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976).

over, petitioner ignores the Georgia Constitution, which by its plain terms as well its authoritative construction imposes the full fiduciary duties of trustees upon public officials.[5] Consequently, even if it were proper to examine the scope of petitioner's obligations under state law, her scheme to benefit herself from an undisclosed conflict of interest would support her conviction under the honest-services theory of the mail fraud statutes.

Finally, petitioner's constitutional challenge to Section 1346 is without merit in any event. Petitioner relies on *United States* v. *Lopez*, 514 U.S. 549 (1995), to argue that her mail fraud prosecution exceeded constitutional boundaries. Pet. 11. In *Lopez*, this Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) (1994), was beyond Congress's power under the Commerce Clause, and observed that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. The Court further noted that "[n]either the statute nor its legislative history con-

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[5] See Ga. Const. Art. I, § 2, Para. I ("Public officers are the trustees and servants of the people and are at all times amenable to them."); *Georgia Dep't of Human Res.* v. *Sistrunk*, 291 S.E.2d 524, 528 (Ga. 1982) ("All public officers, within whatever branch and at whatever level of our government, and whatever be their private vocations, are trustees of the people, and do accordingly labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts."); *Liner* v. *North*, 373 S.E.2d 846, 848 (Ga. Ct. App. 1988) ("As a fiduciary, appellee acquired a number of legal duties[.] * * * Among these duties were the duty to avoid potential conflicts of interest and the duty to give full and fair disclosure in a timely manner of all known things adversely affecting the appellant beneficiaries' rights in the subject matter of the dealings.").

tain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.* at 562. *Lopez* has no application to this case, because a conviction under Sections 1341 and 1346 requires proof that the mails were used in furtherance of the fraudulent scheme. Sections 1341 and 1346 therefore represent a permissible exercise of congressional power under the Post Office Clause, U.S. Const. Art. I, § 8, Cl. 7. See *Badders* v. *United States*, 240 U.S. 391, 393 (1916); see also *Parr* v. *United States*, 363 U.S. 370, 389-390 (1960).

2. Petitioner also contends that Section 1346 is unconstitutionally vague because it failed to provide her with notice that her conduct was criminal. Pet. 11-13. That claim also lacks merit. The void-for-vagueness doctrine, rooted in the Due Process Clause, requires that a criminal statute give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). As this Court has explained, in evaluating claims that a statute's proscriptions are unconstitutionally vague, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997); see also *Brumley*, 116 F.3d at 732 ("Gauging fair notice requires an inquiry into the state of the law as a whole, not merely into the words printed on a single page of the United States Code.").

Due process was satisfied here because, both before and after *McNally*, the relevant case law made clear that public officials who seek to gain from undisclosed conflicts of interest may be prosecuted for honest-services fraud. See, *e.g.*, *United States* v. *Grandmaison*, 77 F.3d 555, 566-567 (1st Cir. 1996); *United*

States v. *Waymer*, 55 F.3d 564, 571-572 (11th Cir. 1995), cert. denied, 517 U.S. 119 (1996); *United States* v. *Silvano*, 812 F.2d 754, 759-760 (1st Cir. 1987); *United States* v. *Keane*, 522 F.2d 534, 549 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); see also *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) ("The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain."). In addition, Section 1341 protects defendants from criminal liability for an innocent or accidental failure to disclose a conflict of interest by requiring that the jury find a specific intent to defraud beyond a reasonable doubt. See *Paradies*, 98 F.3d at 1282-1283; *Waymer*, 55 F.3d at 568-569. Such a requirement of specific intent to engage in an act that is *malum in se* does much to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945) (plurality opinion). Accordingly, the district court did not err, let alone plainly err, in failing to dismiss the honest services charges against petitioner on due process grounds.[6]

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[6] There is likewise no merit in petitioner's suggestion that her prosecution implicates First Amendment interests as well. See Pet. 13. Petitioner was not prosecuted for "her advocacy and votes on legislation." *Ibid.* She was prosecuted for engaging in a scheme to use her political influence to funnel state money to organizations that she secretly controlled. Such conduct is wholly unprotected by the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2001